St. John's Law Review

Volume 44
Number 3 *Volume 44, January 1970, Number 3*

Article 17

December 2012

CPLR 3020: Verification of Answer Permitted by Associate of Attorney of Record

St. John's Law Review

surance policy procured by the defendant, and the court permitted the defendant to plead his insurer's payments in reduction of damages.

This exception to the third-party beneficiary argument was recently extended by *Grynbal v. Grynbal*.[83] In that case the plaintiff, a passenger in the defendant's car, was injured in an accident with a joint tortfeasor. The defendant, relying upon *Moore*, claimed an offset for his insurer's medical payments to the plaintiff.

However, in a cross-motion, the joint tortfeasor claimed an offset for these same payments. The court allowed the joint tortfeasor to offset the damages but stated that in the event the plaintiff prevails, contribution of one-half of these medical payments would have to be made to the co-defendant or his insurance carrier in accordance with CPLR 1401.[84] Furthermore, the court held that, in the event that the plaintiff does not recover from the defendant, the joint tortfeasor's offset of medical payments would be disallowed.

The offset allowance to the joint tortfeasor is an important extension of the *Moore* rationale since, as between the plaintiff and the joint tortfeasor, the medical payments are nongratuitous, and hence collateral, benefits. It appears that the joint tortfeasor's right to the offset is a derivative right since *Salinsky* suggests that the court should disallow any offset when the co-defendant is removed from the litigation.

CPLR 3020: Verification of answer permitted by associate of attorney of record.

In *Teichman v. Ker*,[85] the Supreme Court, Nassau County, confronted with an original question arising under CPLR 3020, interpreted the section in a practical manner. The court denied a motion to treat verification of an answer by other than an attorney of record or an attorney of counsel as a nullity. Rather, verification by an associate of the attorney of record was held to be sufficient compliance with the section.

The court noted that the New York Advisory Committee had suggested that "where a firm of attorneys desires the name of the firm

---

to the benefit of such foresight and to reduction on damages. . . ." *Id.* at 891, 264 N.Y.S.2d at 767.

83 32 App. Div. 2d 427, 302 N.Y.S.2d 912 (2d Dep't 1969).

84 CPLR 1401 enables a defendant, who has paid more than his pro rata share, to obtain contribution from the other defendants with respect to the excess paid over and above his pro rata share.

85 60 Misc. 2d 789, 303 N.Y.S.2d 985 (Sup. Ct. Nassau County 1969).

could be used followed by the attorney acting for it."[86] Although this procedure has not yet been adopted, *Teichman* seems to suggest that verification in this manner would be permissible. However, a second suggestion of the Advisory Committee,[87] which would permit attorneys to merely certify, has not been adopted by the legislature, and the courts lack the power to implement it. The purpose of this latter technique would be to place greater emphasis upon the client's veracity.[88]

The *Teichman* court's holding will undoubtedly be welcomed by the busy practitioner who is often out of town and unable to perform the mechanical function of signing a verification. The question remains, however, whether this practice can be extended to affirmations made pursuant to CPLR 2106. Since 2106 is intended to save an attorney time and trouble,[89] it would seem that the courts might be inclined to approve this procedure as well. However, since the sanction for false swearing is conviction for perjury,[90] the signature of an associate should not suffice under such circumstances.

CPLR 3025(b): Leave to amend answer denied because plaintiff would be prejudiced thereby.

Leave to amend pleadings shall be freely given.[91] However, a court may, in its discretion, impinge upon this statutory latitude.[92] In *James-Smith v. Rottenberg*,[93] an action for breach of a contract for the sale of realty, the defendant's answer contained only a general denial. However, two years later he moved to amend his answer so as to include the affirmative defenses of fraud and illegality. The appellate division, reversing the trial court, denied the motion. The court found that the bases of the affirmative defenses were known, or should have been known, at the time the original complaint was served.[94]

---

86 FIRST REP. 73-74.

87 *Compare* FINAL REP. A-426 *with* SIXTH REP. 43, 277-78.

88 7B MCKINNEY'S CPLR 3020, supp. commentary 175, 176 (1969). For a severe criticism of the verification process as it exists in New York see Professor Siegel's remarks. *Id.* at 175-77.

89 2A WK&M ¶ 2106.01 (1969).

90 N.Y. PENAL LAW § 210.40 (McKinney 1967).

91 CPLR 3025(b).

92 *See* 7B MCKINNEY'S CPLR 3025, supp. commentary 191, 193 (1969): "3025(b) intends the 'widest possible discretion' to be lodged in the court. . . ."

93 32 App. Div. 2d 792, 302 N.Y.S.2d 355 (2d Dep't 1969).

94 *See* 3 WK&M ¶ 3025.15 (1969) wherein it is noted that:

> [S]ome cases have held that leave will be denied if the moving party knew or should have known of the facts or the cause of action sought to be added at the time of the original pleading and cannot satisfactorily explain his failure to plead them at that time.